(8) (7)

Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

CHESAPEAKE AND POTOMAC TEL. CO. OF VIRGINIA, *et al.*,
Respondents.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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QUESTION PRESENTED

Whether the court of appeals incorrectly held that 47 U.S.C. § 533(b)—enacted in 1984 as a presumptive bar on the local telephone monopolies' entering the cable television business in their telephone-service areas, but allowing entry where there is good cause—is invalid under the First Amendment.

PARTIES TO THE PROCEEDING

The National Cable Television Association, Inc., petitioner in No. 94-1900, was an appellant in the court of appeals, along with the United States of America, Federal Communications Commission, and Janet Reno, as Attorney General of the United States, who are petitioners in No. 94-1893. The appellees in the court of appeals, who are respondents here, are the Bell Atlantic Corporation and its relevant subsidiaries: The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company; C&P Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of West Virginia; the Diamond State Telephone Company; The Bell Telephone Company of Pennsylvania; New Jersey Bell Telephone Company; and Bell Atlantic Video Services Company.

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BRIEF FOR PETITIONER NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Petitioner National Cable Television Association (NCTA) seeks reversal of the decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-45a) holding that 47 U.S.C. § 533(b)—the telephone cable cross-ownership statute—is invalid under the First Amendment.[1]

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioner NCTA states that it has no parent company and no subsidiaries.

"Pet. App." refers throughout this brief to the appendix to NCTA's petition, in No. 94-1900.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 42 F.3d 181. The opinion of the district court (Pet. App. 46a-93a) is reported at 830 F. Supp. 909.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. Pet. App. 3a. Timely petitions for rehearing were denied on January 18, 1995. Pet. App. 94a-96a. Chief Justice Rehnquist extended the time for filing a petition for certiorari to May 18, 1995. Pet. App. 97a. The government's petition was filed on May 17, 1995, and NCTA's petition was filed on May 18, 1995. This Court granted the petitions, and consolidated the cases, on June 26, 1995. JA 386-87.

STATUTORY PROVISION INVOLVED

Section 533(b) of Title 47, United States Code, provides:

> (1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole, line, conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

> (3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission).
>
> (4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

STATEMENT

The telephone-cable cross-ownership statute at issue, 47 U.S.C. § 533(b), imposes a presumptive bar (paragraphs (1) and (2)), subject to waiver for good cause (paragraph (4)), on integration by the local telephone monopolists into the business of selling cable television service in their local telephone-monopoly regions. The statute addresses the well-recognized, structural economic problems that arise when a regulated monopolist (telephone) enters a closely related unregulated (or less regulated) business (cable). Such integration always generates the incentive, and often provides substantial opportunities, for the monopolist to engage in cross-subsidization, discriminatory self-preference, and other conduct that simultaneously enables it to evade regulation's restraint on its full exploitation of its monopoly ratepayers and, at the same time, to distort, raise prices in, or even gain power in the newly entered market. The incentives to engage in such conduct are particularly great

if the newly entered business is itself a threat to the basic monopoly, as cable is to telephony, so that unfair competition in the entered market may reinforce and protect the monopoly. In these circumstances, it is well recognized that restricting entry may be pro- rather than anticompetitive. *See* pages 8-12, 36-40, *infra*.

Section 533(b) was enacted in 1984, based on a Federal Communications Commission rule adopted in 1970, to address this situation. How serious the problem is and how it should be addressed require a determination whether the anticompetitive risks outweigh the normal procompetitive benefits of allowing entry. And in evaluating the risks and selecting a remedy, the policymaker's basic choice between a structural bar and regulatory oversight focuses ultimately on an assessment of administrative standard-setting and monitoring as a means of controlling cross-subsidy and discrimination: how effective such regulatory controls would likely be, how costly they would be to implement, and how much error should be tolerated. In the telephone-cable situation, these assessments have been made, and the balance has been struck, differently at different times by different policymakers.

Section 533(b), in paragraphs (1) and (2), chooses simple structural separation of the telephone and cable businesses as the presumptively needed means of addressing the undoubted economic problems, and thus fostering and preserving the presence of two wire networks, rather than one wire network, for electronic communications into the home. Paragraph (4) of the statute also allows waivers for "good cause." And the Commission, exercising its authority under paragraph (4), recently concluded that the balance of risks and benefits has now sufficiently changed that the policies behind Section 533(b) are best fulfilled through regulatory oversight under certain conditions rather than structural separation. Pet. App. 103a-121a; *id*. at 105a & n.4.[2]

[2] Congress is considering telecommunications legislation that would replace Section 533(b) with narrower, regulatory constraints on telephone company entry into the cable business. Both the House and Senate have enacted bills containing such provisions. The legislation is expected to go to conference soon.

I. Administrative and Statutory Background

A. *Administrative History*. In the late 1960s, the Federal Communications Commission examined well-documented telephone company efforts to prevent the development of an independent cable television industry, then in its infancy. In 1968, the Commission required telephone companies to obtain certification, under 47 U.S.C. § 214, before constructing, acquiring, or operating video transmission facilities. *General Tel. Co. of California*, 13 F.C.C.2d 448 (1968), *aff'd, General Tel. Co. of California v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The FCC noted that "[b]y reason of its control over utility poles, or other local advantages resulting from its status as an existing common carrier in the community, the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition." *Id*. at 463. The Section 214 process subsequently revealed that telephone companies had in fact discriminated in favor of their affiliates and "otherwise improperly extended their existing monopoly in the telephone field to CATV services." *Applications of Telephone Companies for Section 214 Certificates*, 34 Fed. Reg. 6290, 6290-91 (1969).

In 1969, therefore, the Commission proposed to address the problems of "undue concentration of control of CATV systems by telephone companies," "anticompetitive practices" by telephone companies, and "possible unfair competitive advantages" of telephone companies in the cable business, such as the ability of telephone companies to "subsidize the cost of construction and services required by their affiliates out of revenues derived by the telephone companies from their other services." *Id*. at 6292. In 1970, the Commission concluded that the proper response was a rule that presumptively barred

telephone companies from providing cable television service within their local exchange areas, except upon grant of a Commission waiver. *Applications of Telephone Companies for Section 214 Certificates*, 21 F.C.C.2d 307, *recons. in part*, 22 F.C.C.2d 746 (1970), *aff'd, General Tel. Co. of the S.W. v. United States*, 449 F.2d 846 (5th Cir. 1971). The Commission rule, which from the beginning has provided for waivers of the prohibition upon a showing of "good cause" (and in other specified circumstances), is codified in its current form at 47 C.F.R. §§ 63.54-.56.

In adopting its rule, the Commission explained that "the prevention of undesirable concentration of control of communications media has always been of great concern" (21 F.C.C.2d at 328) and noted the Justice Department's conclusion that telephone companies were "seeking to extend their regulated telephone monopoly into the areas of CATV [cable television] and broadband coaxial cables, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future" (*id.* at 324).[3] The Commission pointed specifically to telephone companies' ability, by virtue of their "monopoly position," to discriminate against cable operators seeking

[3] The Eighth Circuit later described and quoted the Justice Department's 1970 comments: "The Department of Justice early recognized that CATV operators and telephone companies were both competitors and potential competitors. In 1970 it stated: . . . 'independent CATV operators and the telephone companies were present and direct competitors in the construction of CATV distribution systems. . . . The telephone companies have made it clear that they regard cable operators as potential competitors for a variety of services.'" *TV Signal Co. of Aberdeen v. AT&T*, 617 F.2d 1302, 1308-09 (8th Cir. 1980) (quoting Justice Department comments to FCC). The Eighth Circuit added: "in the present case there exists evidence that the purpose of Bell's exclusion policy [limiting use of poles] was to coerce operators to utilize Bell's own equipment, thus yielding greater revenue to Bell, and deterring independent operators from entering the CATV and potential broadband communications fields." *Id.* at 1309 n.7.

essential access to telephone poles and underground conduits for their cable television wires. *Ibid.* The Commission also noted evidence that telephone companies with cable affiliates "can subsidize those affiliates with revenues obtained through telephone company operations." *Id.* at 311.

In the years following its adoption, the Commission applied the rule and reaffirmed its role in restraining the local telephone company's "potential, by reason of its monopoly position in the community, to discriminate against CATV operators who desire to provide their own distribution facilities." *Better T.V., Inc. of Dutchess County*, 31 F.C.C.2d 939, 957, 966-67 (1971), *modified on other grounds*, 34 F.C.C.2d 142 (1972); *see, e.g., California Water & Tel. Co.*, 40 F.C.C.2d 1138 (1973); *Telephone Co. Affiliation with CATV Systems*, 41 F.C.C.2d 938 (1973). In 1978, the Commission reiterated that its 1970 rulemaking had considered various issues, including "the prevention of potential favoritism by a telephone company towards an affiliated cable television system either in the methods of establishing it, or by subsidizing the affiliate to the detriment of telephone subscribers," as well as the concentration of control from a telephone-cable combination. *Cross Ownership Rules*, 69 F.C.C.2d 1097, 1099 n.5 (1978). The Commission also made clear, based on its recognition that a single integrated voice-video network was now in the offing (*id.* at 1106-08), that its consideration of applications for waiver based on "good cause" would "permit explicit consideration of recent technological developments" and of "the nature and extent of reasonably foreseeable economies from joint or integrated operation," while guarding against "potentially adverse cross-subsidization between a carrier's telephone and cable television business." *Id.* at 1111.[4]

[4] The Commission subsequently ruled that "good cause" waivers were not limited to those circumstances where independent cable

In 1981, after Congress addressed part of the problem through the Pole Attachments Act,[5] the Office of Plans and Policy of the Commission undertook at the Commission's direction a comprehensive analysis of the cross-ownership rule (among other matters) and produced an extensive report, *FCC Policy on Cable Ownership: A Staff Report,* reviewing and ultimately reaffirming the need for the in-region presumptive bar. JA 31-78 (excerpts). The report explained that permitting cross-ownership might have economic and technological benefits (JA 43-52), while noting that technological benefits may be grounds for waiver (JA 50 & 41 n.4). The report then explained why there were still overriding risks.

"The disadvantages of crossownership largely derive from the fact that telephone companies are regulated exclusive franchise monopolists in their local area." JA 52. That fact meant that integration into cable can enable the telephone company "partially to avoid rate-of-return regulation on its telephone service . . . by attributing costs to the regulated telephone division and revenues to an unregulated cable division," with the result that telephone ratepayers would be exploited by higher prices and the cable markets distorted through subsidized entry. *Ibid.; id.* at 54-58. Such cross-subsidization would be "harder to control if cable and telephone system costs are incurred in one area for the same types of equipment, or are to some extent joint or common." JA 57 (foot-

operation is impossible but would be available upon a showing of "[c]lear and substantial economies in construction or operation." JA 41 n.4; *Sugar Land Report and Order,* 76 F.C.C.2d 230, 235-36 (1980); *see* JA 43 n.7.

[5] Congress enacted the Pole Attachments Act of 1978 to "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1). The Act leaves considerable room for costly dispute over such terms and conditions, however, and does not, in any event, guarantee access in the first place. *See FCC v. Florida Power Corp.,* 480 U.S. 245, 251 n.6 (1987).

note omitted).[6] The telephone companies have a uniquely strong incentive to engage in such conduct with respect to cable because doing so can help forestall the competitive threat that cable presents to the telephone business itself, whether for voice or data carriage or for bypass of the local exchange for access to long-distance carriers. JA 53, 58-60; *id.* at 59 ("cable has more potential to provide telephone-like services in the near future than does any other carrier"). These reasons, the report concluded, "are sufficient to overcome the social presumption in favor of allowing unrestricted crossownership." JA 63 (footnote omitted).[7]

The 1981 report extensively discussed the possibilities of addressing the "problems of crossownership directly, through regulation." JA 67; *id.* at 67-78. Having noted the intractable problem of cost allocation (*see* note 6, *supra*), the report explained the substantial reasons to doubt the effectiveness of regulatory efforts, at that time and possibly in the long run, to prevent discrimination and cost-shifting. *Ibid.* The report concluded that "regulatory tools cannot now solve the problems involved in crossownership between cable and telephone facilities." *Id.* at 75. These conclusions were the most comprehensive and recent analysis of the specific telephone-cable issue before Congress acted in 1984. *See also Telephone Co.-Cable Television Cross-Ownership Rules,* 84 F.C.C.2d 335 (1981) (initiating proceeding to reconsider the cross-ownership rule).

[6] "One of the most difficult aspects of telephone regulation is the assignment of costs to their causes. Cable and telephone systems share a certain amount of capital equipment; allocating shared costs between these capital accounts on the basis of actual cost causation will be difficult or impossible." JA 57 (footnote omitted).

[7] The report also noted evidence that pole-access problems had continued despite the 1978 statute, but it concluded that the "problem of pole access does not by itself justify banning crossownership." JA 62.

B. *The Bell System Breakup.* In 1982, the government and AT&T announced their agreement, as a settlement of the 1974 monopolization case, to break up the Bell System so as to separate the local monopoly businesses (now the Bell Operating Companies, or BOCs, including Bell Atlantic) from the competitive businesses (which remained with AT&T). *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). Substantial evidence had been developed by the government that the Bell System had extensively used its local monopoly power to impair or to forestall competition in related markets, including long-distance, equipment, and even cable. *See, e.g.*, JA 253, 255-56, 260-61. And the consent decree that settled the lawsuit not only broke apart the existing Bell System but barred the local monopolies from entering certain related competitive businesses (long-distance, equipment manufacturing, and "information services," the last including cable television, *see* JA 219) that, because of large common costs or opportunities for discrimination, presented great dangers from what a congressional report the prior year had succinctly described as "the incentives of a regulated/unregulated company." [8]

The economic evils targeted by the ban on regulated/unregulated integration were explained by the United States in its defense of the breakup decree. "[T]he BOCs' control over essential local exchange facilities will give them both the power and incentive to disadvantage competitors in related markets through cross-subsidization and

[8] *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry* ("Wirth Report"), Report by Majority Staff of Subcomm. on Telecomm., Consumer Protection, and Finance of House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 58 (1981). This report, chapter 4 of which provides a concise description of the economic dangers of the regulated telephone monopolists' entry into related businesses, was produced by the same House subcommittee that was principally responsible for the 1984 Cable Act.

discriminatory actions." *United States' Response to Public Comments*, 47 Fed. Reg. 23,320, 23,336 (1982); *id.* at 23,323. Moreover, "regulatory mechanisms . . . are not sufficient to control the long term incentives and abilities the BOCs would have to disadvantage competitors in related markets. At the heart of the government's case in *United States* v. *AT&T* was the failure of regulation to safeguard competition in the face of the powerful incentives and abilities of a firm engaged in the provision of both regulated monopoly and competitive services." *Id.* at 23,336.[9]

As to cross-subsidy: "the FCC struggled for more than 20 years unsuccessfully to solve the problem of allocating common costs between competitive and non-competitive services"; "[t]here is simply no single correct formula for [such] allocation"; and in any event, "the possession by the BOCs of relevant cost information, the extent of common costs, and the high degree of discretion in the treatment of such costs enjoyed by the BOCs, would very likely frustrate meaningful regulatory oversight, especially in light of strong incentives on the part of the BOCs to do so." *Ibid.* As to discrimination: "this is a subject that has preoccupied regulation for more than a decade with little success"; and regulation is not likely, in such a "technologically dynamic industry," to be "capable of detecting or preventing the very subtle forms of discrimination that would be available to the BOCs." *Ibid. See id.* at 23,337. The government also explained that, while

[9] "If the BOCs, as rate base/rate of return regulated monopolists, were permitted to enter related competitive markets, they would have the means and incentive to disadvantage their competitors by cross-subsidization and discrimination in the terms and conditions of access to the local exchange. Neither of these problems has thus far proven amenable to successful regulatory solution. Indeed, the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are otherwise insoluble." 47 Fed. Reg. at 23,336.

the dangers were attenuated where few common costs or opportunities for discrimination existed (*id.* at 23,335), the dangers were greatest, and least amenable to regulatory control, precisely when the same switching equipment was used for the provision of both regulated telephone service and some other service (*id.* at 23,338-39).

C. *The 1984 Cable Act.* Against this background, Congress enacted Section 533(b)—the telephone-cable cross-ownership statute—as part of the comprehensive 1984 Cable Act.[10] With only a few changes of language, the statute codified the Commission's rules presumptively barring the local telephone companies from entering the cable business inside their telephone-service regions (paragraphs (1) and 2)).[11] Congress also included a provision (paragraph (4)) authorizing Commission waivers

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[10] We note two points of terminology. First, although Bell Atlantic has throughout this proceeding insisted that Section 533(b) is not really a "cross-ownership" rule, the Fourth Circuit recognized that this was a "merely semantic" point, since the analysis does not turn on labels. Pet. App. 9a n.7. We follow the familiar label, reflecting the facts that the provision applies by its terms to telephone company ownership of a cable *business*, Congress included it among the "ownership restrictions" set forth in Section 533, and "cross-ownership" is the term that was used by the legislative history (*e.g.*, H.R. Rep. 934, 98th Cong., 2d Sess. 55 (1984)) and has always been used by the Commission.

Second, we use the term "cable" as a shorthand for the (narrower) statutory term "video programming." The statute has been construed by the Commission and the D.C. Circuit as applying only when a telephone company provides video programming over a "cable system." *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995).

[11] Consistent with the statute's underlying purposes, the Commission has indicated that Section 533(b) applies, not to all companies that are in any way in the "telephone" business, but only to local exchange carriers—*i.e.*, "traditional landline local exchange telephone companies" providing "ubiquitous, interconnected switched service" over "bottleneck facilities." *In re Application of Teleport Communications—New York*, 7 F.C.C.R. 5986, 5988, *recons. denied*, 8 F.C.C.R. 5464 (1992), *vacated as moot*, No. 92-1521 (D.C. Cir. Oct. 11, 1994).

upon a showing of "good cause" and directed the Commission to grant such a waiver where "justified by the particular circumstances demonstrated by [an applicant], taking into account the policy of this subsection."[12]

The legislative history of these provisions is not elaborate. At hearings in 1982, the Senate received testimony from both cable and telephone industry witnesses reciting the concerns about discrimination and cross-subsidization. *Cable Television Regulation: Hearings on S. 2172 before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 107-08, 344, 386-90, 590, 623 (1982). And there was debate about whether the whole issue should be left to the continuing authority of the Commission, as the Commission's chairman urged. *Id.* at 97. In the 98th Congress, the Senate enacted a cable bill that did not contain a provision codifying or otherwise addressing telephone-cable cross-ownership. *See* S. Rep. 67, 98th Cong., 1st Sess. 34 (1983); 129 Cong. Rec. 15451-54 (1983).

The House, which substantially wrote what became the 1984 Cable Act, added what is now Section 533(b). The House Report recites simply the congressional aim "to prevent the development of local media monopolies, and to encourage diversity of ownership of communications outlets." H.R. Rep. 934, 98th Cong., 2d Sess. 55

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[12] As part of Section 533, Congress included, in addition to the telephone-cable cross-ownership rule of subsection (b), a rule restricting cross-ownership between broadcast stations and local cable systems (subsection (a)(1)) and a provision granting authority to the FCC to adopt additional restrictions on ownership of cable systems by owners of other media of mass communications (subsections (c), (d)). The Commission has long had a regulation barring ownership of cable systems by a television network. 47 C.F.R. § 76.501(b). In 1992, Congress added a bar on ownership of a cable business by an in-region "multichannel multipoint distribution service" (MMDS, a form of "wireless cable") or a separate "satellite master antenna television service" (SMATV). Subsection (a)(2).

(1984).[13] *See also* 130 Cong. Rec. 27975 (1984) (statement of sponsor, Rep. Wirth) (cross-ownership rule intended "to promote a greater diversity of ownership of cable systems"). The bill as passed by the Committee did not contain a general waiver provision going beyond the "rural" exemption that is now found in paragraph (3). H.R. Rep. 934, *supra*, at 104. On the floor, however, the House added what is now paragraph (4), providing for "good cause" waiver authority. The debate over the flexibility to be accorded the Commission resolved itself by the express adoption of the Commission's pre-existing "good cause" language, the inclusion of language directing that waivers be granted "upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection [*i.e.*, Section 533(b)]," and the floor declarations by the sponsors that the provision should be "narrowly construed." *See* 130 Cong. Rec. 27978, 31873, 32280 (1984).[14]

The legislative record makes clear that Section 533(b) was enacted without opposition from the local telephone companies. Those companies and their congressional supporters were not absent from the debate: expressly recog-

[13] In discussing First Amendment issues, the House Report relies on this Court's decision in *FCC v. National Citizens Committee for Broadcasting (NCCB)*, 436 U.S. 775 (1978), unanimously upholding the broadcast-newspaper cross-ownership rule and, in addition, compares the telephone-cable cross-ownership "structural regulation" to the Bell breakup decree's bar on the local telephone monopolists' entry into related businesses. H.R. Rep. 934, *supra*, at 33, 57. The Senate Report refers to the 1981 FCC Staff report. S. Rep. 67, *supra*, at 20.

[14] The House version of the provision subsequently was adopted in conference and by both houses. *Id.* at 31884, 32277-88 (1984). At the same time, the conference added and both houses adopted what is now paragraph (6) of the statement of congressional purpose behind the 1984 Act: to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6). The bill became law on October 30, 1984.

nizing cable's competitive threat to aspects of the telephone business, they fought hard to prevent cable operators from using the new Act to offer non-video services on their networks in direct competition with telephone services.[15] But they did not oppose the cross-ownership rule. To the contrary, the record states that, with the revisions worked out in the House (including the adoption of the "good cause" waiver authority), Bell Atlantic and other telephone companies gave explicit support for Section 533(b). 130 Cong. Rec. 27982 (1984) (remarks of Rep. Dingell)[16]; *see also Options for Cable Legislation*, *supra*, at 1088-89 (Pacific Telephone official noting absence of opposition to cross-ownership rule).

D. *Post-1984 Developments.* Consideration of the issue continued in the Commission after enactment of the statute. In 1988, the Commission tentatively concluded that it should recommend the statute's repeal. *Further Notice of Inquiry, In re Telephone Company-Cable Television Cross-Ownership Rules*, 3 F.C.C.R. 5849. The Commission recognized that commenters "have failed to present any evidence, and do not seriously contend, that carriers do not have the ability to subsidize affiliated cable operations" (*id.* at 5854) and noted that "telephone companies continue to have the ability to deny potential competitors access or to engage in anticompeti-

[15] *See, e.g.*, H.R. Rep. 934, *supra*, at 26-27; 129 Cong. Rec. 15455-56, 15458-59, 15465, 15468-69, 15474 (1983); *Options for Cable Legislation: Hearings on H.R. 4103 et al. before the Subcomm. on Telecomm., Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 173, 435, 501, 607, 1087 (1983).

[16] "The measure the House is considering today contains additional protections for telephone companies regarding cross-ownership and pole attachment rules. With these additions, all issues of concern to the telephone industry have been fully and fairly resolved. I am aware of no formal objection to this legislation at this time from the telephone industry. Indeed, I have received support for the telephone-related parts of this measure from additional segments of the telephone industry, including Ameritech, Bell South, and Bell Atlantic." *Ibid.*

tive cross subsidies" (*id.* at 5860). Nevertheless, the Commission "tentatively conclude[d] that the costs of the cross-ownership ban exceed the benefits" (*id.* at 5858). The Commission specifically concluded that Section 533(b) is valid under the First Amendment (*id.* at 5864), so that its legislative recommendation of repeal was a matter of policy judgment—a judgment opposed at the time by, among others, the National Telecommunications Information Administration (NTIA). *Id.* at 5856; *see* Ct. App. JA 8090.

In 1992, the Commission (by a 3-2 vote) formally recommended that Congress "amend the Cable Act to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards." *Second Report and Order* (*Video Dialtone Order*), 7 F.C.C.R. 5781, 5847. The Commission recognized the dangers of this course of action but concluded that, if safeguards were adopted, the risks would be "outweighed by the potential public interest benefits." *Id.* at 5848-49. Both NTIA and the Justice Department now voiced similar policy views. *See* Pet. App. 55a n.8.

Congress, meanwhile, was actively considering the issue. Proposals to repeal Section 533(b) and to substitute a variety of regulatory safeguards (such as limitations on a telephone company's use of more than 25% of its channel capacity, coupled with separate corporate operations and close FCC supervision) were introduced in Congress repeatedly between 1988 and 1992. During extensive hearings, evidence was submitted explaining the continued existence of anticompetitive dangers and the inadequacy of regulatory checks. *See* Pet. App. 55a-56a; Ct. App. J.A. Tabs 65-67, 102-03, 107-22.

In the 1992 Cable Act, Congress rejected the proposals for repeal. It instead chose other means to regulate the cable industry, including rate regulation, prohibition of exclusive franchising, and promotion of diverse ownership of new wireless cable technologies. *See* 47

U.S.C. §§ 533(a)(2), 541(a), 543. The Senate Report accompanying the 1992 Act reaffirms that Section 533(b) and the other cross-ownership rules still "enhance competition." S. Rep. 92, 102d Cong., 1st Sess. 46-47 (1991).

II. This Litigation

A. *District Court Proceedings.* In 1992, respondents Chesapeake and Potomac Telephone Company of Virginia and Bell Atlantic Video Services brought this suit in the United States District Court for the Eastern District of Virginia seeking to enjoin enforcement of Section 533(b) as invalid under the First Amendment. The original defendants were the United States, the Attorney General, and the Commission. Petitioner NCTA intervened as a defendant. Ultimately (after judgment), Bell Atlantic Corporation and its other subsidiaries offering local telephone service (all respondents here) were joined as plaintiffs—collectively, "Bell Atlantic." *See* JA 4.

The parties filed cross-motions for summary judgment and compiled a record that, on the defendants' side, included expert economist affidavits, government reports, and other materials explaining the rationale behind Section 533(b) and the reasonableness of choosing a structural over a regulatory solution to the problems addressed by the statute. *See, e.g.*, JA 31 (1981 FCC Staff report), 79 (1987 GAO report), 119 (1993 GAO report), 222 (affidavit of professor and former Commissioner Glen Robinson), 241 (affidavit of Dr. Bruce Owen, professor and former chief economist of the Antitrust Division and of the White House Office of Telecommunications Policy), 331 (reply affidavit of Dr. Bruce Owen). The district court granted judgment for Bell Atlantic, holding that the statute on its face violates the First Amendment. Pet. App. 46a-93a. The court did not discuss, and the parties did not press any argument based on, the "good cause" waiver provision of Section 533(b)(4). *See* Pet.

App. 47a (treating case as involving only the presumptive bar set forth in Section 533(b)(1) and (2)).

The district court initially reasoned that the appropriate standard of review was neither strict scrutiny nor rationality review but "intermediate scrutiny" as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The district court thus asked if the statute is " 'narrowly tailored to serve a significant governmental interest' " unrelated to content and " 'leave[s] open ample alternative channels for communication.' " Pet. App. 61a. On the second issue, the court had "little doubt that the statute leaves open ample alternative channels for communication." Pet. App. 81a. "Clearly, . . . § 533(b) operates only as a restriction on the 'manner' in which plaintiffs may speak, not as an outright ban on their ability to do so." Pet. App. 71a n.19.[17]

On the narrow tailoring issue, the district court readily concluded that "the preservation of diversity of ownership of communications outlets is a significant governmental interest" (Pet. App. 83a-84a), explained that "courts must not substitute their judgment on policy matters for that of Congress" (*id.* at 86a), and accepted that "cross-subsidization is uncontrollable by means of regulatory oversight" (*id.* at 91a & n.34). Nevertheless, the court

[17] The court detailed some (though not all) of the ways Bell Atlantic may offer video speech. "Plaintiffs may provide video programming to audiences outside their service area, and may speak through any type of non-video medium to audiences inside their service area. Even more significantly, however, plaintiffs may also reach audiences within their service area with video programming. Section 533(b) only prohibits plaintiffs from *directly* providing video programming to their subscribers. Plaintiffs are not prohibited from producing their own video programming and marketing it to broadcasters or cable operators for transmission by means other than the plaintiffs' own facilities. Public access requirements ensure that such programming cannot be silenced by the entities responsible for the direct provision of video programming." Pet. App. 71a n.19.

held that the cross-ownership rule failed intermediate scrutiny for the sole reason that, in the court's view, there was no greater likelihood of exploitation of monopoly power from telephone companies' entry into cable than from what is currently permitted—offering of common-carrier video *transmission* service to unaffilated programmers, who then independently sell programming to consumers. *Id.* at 91a-92a ("[t]he essential point is that telephone companies may already, under existing law, compete in the video transport market, and if it were possible for them to reap supracompetitive profits in that market through cross-subsidization, the telephone companies could do so irrespective of § 533(b)"); *id.* at 88a. The district court enjoined enforcement of Section 533(b) against Bell Atlantic and its various subsidiaries. *See* Pet. App. 5a.

B. *The Court of Appeals Decision*. The Fourth Circuit affirmed. Pet. App. 1a-45a. The court began by stating that it need not consider the waiver provision of Section 533(b)(4), which the court described—overlooking the "good cause" standard—as limited to situations where cable service could not be provided except by a telephone company. Pet. App. 4a n.1. Looking only at Section 533(b)(1) and (2), the court agreed with the district court that the proper standard of review was "intermediate scrutiny," as most recently elaborated in *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445 (1994). Pet. App. 16a-33a. In applying the standard, the court treated as wholly irrelevant this Court's unanimous ruling in *FCC v. National Citizens Committee for Broadcasting (NCCB)*, 436 U.S. 775 (1978), that a broadcast licensee could constitutionally be barred from entering the newspaper business in its broadcast service area. Pet. App. 18a-19a.[18]

[18] The court mistakenly attributed to NCTA the view that *NCCB* calls for, and Section 533(b) should be subject to, mere rationality review. *See* Pet. App. 17a-20a. NCTA in fact urged that *NCCB*, though not expressly invoking any standard, supplied

Applying *Turner*, the Fourth Circuit agreed that the governmental interests in preventing "cross-subsidization" and "network-access discrimination" and "preserving diversity of ownership of communications outlets and of the means of electronic access to homes and businesses" were unquestionably significant. *Id.* at 33a-34a. The court also took as a given "that ordinary regulatory oversight is insufficient to guard against telephone company use of cross-subsidization in the cable transport market" and that, *contrary* to the district court's "essential" rationale, telephone company entry into the (less regulated) retail cable business does in fact present greater economic problems than telephone company offering of (more tightly regulated) common carrier transmission service. *Id.* at 39a. Even so, the court of appeals concluded that the statute failed intermediate scrutiny.

The first problem, the court held, was that in the absence of factual findings by Congress (Pet. App. 35a, 39a) or a record of pre-1984 FCC consideration of "other, less drastic regulatory schemes" (*id.* at 40a), the court was "not convinced" that Section 533(b) is narrowly tailored to address the identified problems. *Id.* at 39a. The court cited a single " 'obvious less-burdensome alternative' " as the reason for its conclusion (*id.* at 41a): a rule requiring telephone companies to offer a fixed percentage of their channel capacity to independent programmers (coupled, presumably, with rules on cost accounting and discrimination, plus administrative oversight). *Ibid.* The court did not offer an explanation, or citation to any evidence in the record, showing how—on the court's own assumption that "ordinary regulatory oversight is insufficient" (*id.* at 39a)—this alternative so demonstrably protected against the evils targeted by Section 533(b) as to justify upsetting Congress's judgment.

a "similar framework" to intermediate scrutiny. NCTA Ct. App. Reply Br. 1, 8; *see* NCTA Ct. App. Br. 13, 16.

The second problem with Section 533(b), the court concluded, is that it does not "leave open ample alternative methods of communication." Pet. App. 43a. Without any reference to the "good cause" provision of Section 533(b)(4), the court characterized the statute as "bar[ring] absolutely the telephone companies from entering, with editorial discretion, the cable television market." *Id.* at 43a. The court did not dispute (or in some instances recognize) that Bell Atlantic may offer video programming in various ways: *e.g.*, through its own broadcast stations or networks or others' broadcast stations or networks; through its own satellite or wireless cable service; through independent cable systems (by selling its programming, as other cable programmers must do; or by using leased access, under 47 U.S.C. § 532); through providing its programming to the retail program packagers/providers on Bell Atlantic's own video network.[10] The court stressed that, "unlike other video programmers, the telephone companies *cannot guarantee* that their programming will reach this audience." Pet. App. 13a-14a.

Both the government and NCTA sought rehearing. Petitioner NCTA argued that the "good cause" waiver authority of Section 533(b)(4) was broad enough to allow for the very sort of "narrow tailoring" of restrictions on telephone company provision of video program-

[10] On a video dialtone network with Section 533(b)(1) and (2) enforced, the telephone company provides the transmission platform (and several other consumer services) but does not act as a retail seller of programming to consumers. Instead, it leases channels on the network, individually or in groups, to independent programmers/packagers, who, like cable operators, may acquire programming from diverse sources and then act as the retailers of video programming to consumers. The Commission has made clear that Section 533(b) presents no bar to the telephone companies' reaching their in-region audience by supplying their programming to the independent programmers/packagers on their video dialtone networks. *See Video Dialtone Reconsideration Order*, 10 F.C.C.R. 244, 280-01 (1994); *In re Time Warner Entertainment Co.*, 8 F.C.C.R. 7106 (1993).

ming that would avoid the substantial constitutional problems that the Fourth Circuit found present in the basic cross-ownership bar (paragraphs (1) and (2)) when read in isolation from the waiver authority.[20] The government, however, was silent on the issue. The court of appeals denied rehearing on January 18, 1995. Pet. App. 94a-97a.

III. Subsequent Agency Action

Two days after rehearing was denied, the Commission released an order tentatively proposing the "saving" construction of the "good cause" waiver provision that the Fourth Circuit had just passed over without comment. *See* Pet App. 98a-102a. The Commission noted the substantial constitutional questions reflected in the Fourth Circuit's opinion and its obligation to construe the statute, which it administers, to avoid such questions. Pet. App. 100a.[21] The Commission explained that "good cause" ordinarily refers to "changed circumstances" and that circumstances in the cable industry—"no longer a fledgling industry"—had changed dramatically. *Id.* at 99a. The Commission also reasoned that, if regulatory safeguards designed to address the economic dangers underlying the statute were fashioned, compliance with those safeguards as a condition of a waiver would "constitute 'particular circumstances . . ., taking into account the policy' of Section 533(b)." Pet. App. 100a. In the Commission's proposed view, then, the "good cause" waiver provision, previously overlooked in the analysis of Section 533(b), should be construed to narrow the cross-ownership rule so

[20] Prompted by a new Ninth Circuit ruling, *GTE California, Inc. v. FCC*, 39 F.3d 940, 946 (1994), NCTA had briefly raised this issue in a letter to the Fourth Circuit one week before the Fourth Circuit's decision.

[21] At present, all of the Regional Bell Operating Companies are beneficiaries of court decisions holding, without regard to the statutory waiver authority, that Section 533(b) is unconstitutional. *See* Pet. App. 109a n.15 (citing cases, including *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995)).

as to "render Section 533(b) constitutional." *Id.* at 101a.

On May 16, 1995, the Commission adopted this construction of Section 533(b)(4) as a final interpretive rule and concluded that Section 533(b)(4) authorized, at a minimum, the direct provision of programming by telephone companies over their video dialtone networks (*i.e.*, on networks open to independent programmers). *See* Pet. App. 103a, 104a. The Commission noted its duty to "avoid[] the constitutional infirmity identified by the Fourth and Ninth Circuits by making available the ' "obvious less-burdensome alternative" ' referenced by those courts." Pet. App. 107a; *id.* at 116a, 119a-20a. The Commission stated that "absent a waiver allowing telephone companies to offer video programming over video dialtone networks [that is, where other programmers have access to the video network], there is a serious question as to whether Section [533(b)] unnecessarily burdens substantially more speech than is necessary to promote competition in the multi-channel video programming market." *Ibid.* (footnote omitted).

The Commission explained that the policy behind Section 533(b) and the predecessor FCC rule is to promote competition, with the measures having sought to "prevent the telephone companies from using their monopoly position to preempt the market for cable service by excluding others from entry." Pet. App. 111a (footnote omitted). Given cable's maturity now, the Commission reasoned, the "concern with ensuring that the cable industry not be extinguished before it is established is no longer relevant." *Id.* at 112a. So, too, technological changes have "made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns" underlying the presumptive bar: these "changed circumstances" constitute "good cause" for a waiver under proper conditions. *Id.* at 112a-13a.

The Commission added that the rules establishing those conditions—including at least the provision by a tele-

phone company of programming on its own video dialtone network—will constitute " 'particular circumstances . . ., taking into account the policy' " of the statute. Pet. App. 113a (quoting § 533(b)(4)). These rules will not allow telephone company entry in any and all circumstances, but will impose limitations, and those limitations will be designed to address discrimination and cross-subsidization, the evils targeted by Section 533(b). Pet. App. 113a-114a, 117a. The circumstances thus will be "particular" and the policies of the statute taken into account. At the same time, the constitutional questions raised by the Fourth Circuit are avoided, as the waiver authority "constitutes implementation of the 'obvious less burdensome alternative' to the ban identified by the Fourth Circuit." Pet. App. 115a (footnote omitted).

SUMMARY OF ARGUMENT

The Fourth Circuit's invalidation of Section 533(b) should be reversed. The court properly gave the statute the searching inquiry into its justifications and reach that is required under intermediate scrutiny. Under those standards, however, the statute should be upheld, not struck down, against Bell Atlantic's challenge.

1. The Fourth Circuit's decision is wrong, first of all, because it violates the cardinal principle that a statute should be construed, where fairly possible, to avoid constitutional difficulties. The Fourth Circuit simply misread the waiver authority of Section 533(b)(4), disregarding the fact that the Commission is authorized to waive the presumptive cross-ownership bar for "good cause." That authority can hardly be ignored in judging the constitutionality of Section 533(b), for it plainly limits the restrictive reach of the statute. And the provision is in fact properly construed, as the Commission has now done, to narrow the impact of the presumptive cross-ownership bar on telephone companies' speech so as to avoid the serious constitutional questions identified by the Fourth Circuit and, indeed, expressly to allow Bell Atlantic to

offer video programming under the very type of narrowly tailored regulatory safeguards that the Fourth Circuit deemed the constitutionally required alternative to Section 533(b).

The Commission's construction of Section 533(b)(4) is based on identified changes in the circumstances directly relevant to the fulfillment of the pro-competitive policy of the statute. The Commission has thus specified "particular circumstances" in which there is "good cause" for waivers, "taking into account the policy" of the statute. Section 533(b)(4). The Commission's construction should be adopted because it "avoid[s] substantial constitutional questions" and is both "fairly possible" as a textual matter and "not plainly contrary to the intent of Congress." *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467, 472 (1994).

2. Even if this Court rejects the Commission's "saving" construction of Section 533(b)(4), it should reverse the court of appeals' facial invalidation of the statute on summary judgment. The Fourth Circuit did not question the reality of the economic problems targeted by Section 533(b). It rested its decision, instead, on its determination that the targeted problems could and should be addressed through regulatory standard-setting and oversight rather than a structural bar. But that conclusion was improper for the simple reason that there is no adequate ground for deeming unreasonable the congressional determination that regulatory measures are less than satisfactorily effective. Under the standards of intermediate scrutiny as set out in *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445 (1994), Section 533(b) should survive.

The Fourth Circuit also faulted Section 533(b) for leaving too few avenues of speech open to local telephone companies. Nothing in *Turner*, however, indicates that there is a separate inquiry into other avenues of speech, once the statute has been shown to be narrowly tailored—that is, that the means adopted are more effective than alternatives at achieving an important government inter-

est. In any event, the Fourth Circuit's view of the speech avenues left open to local telephone companies was flawed factually and legally. In particular, the court gave little or no regard to a range of means by which telephone companies can offer in-region video speech, including broadcasting, wireless cable, and programming through the retail providers on the telephone companies' planned video dialtone networks. And the court improperly disregarded the most relevant precedent, this Court's decision in *FCC v. NCCB*, 436 U.S. 775 (1978), which unanimously held that the government, upon a proper justification in terms of a legitimate public interest, could bar a broadcaster from entering the newspaper business in its broadcast region, leaving the broadcaster free to publish an out-of-region newspaper and to engage in in-region non-newspaper speech. The similar cross-ownership rule here, well-justified in terms of important public interests, should likewise be upheld.

ARGUMENT

I. SECTION 533(b) IS VALID UNDER A PROPER "SAVING" CONSTRUCTION OF THE WAIVER AUTHORITY SET FORTH IN THAT SECTION

This Court has repeatedly stressed that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994). *See id.* at 472 (where a statutory construction "would raise serious constitutional doubts[,] [i]t is . . . incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress").[22] This principle is rooted in the constitutional respect owed to Congress by the Judicial Branch. It therefore imposes an independent duty on the courts—applicable even in a case, like the present, where the parties themselves overlooked the issue of a saving construction until well into the proceeding. *Cf. Jean v. Nelson*, 472 U.S. 846, 854-55 (1985) (applying rule although both sides, including Government, continued to press for constitutional ruling); *X-Citement Video, supra* (applying rule where Government urged saving construction for the first time in Supreme Court).

[22] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The principle applies in this case. The waiver authority set forth in Section 533(b)(4), if construed as the Commission has now properly construed it, eliminates the "substantial constitutional questions" identified by the Fourth Circuit and numerous other federal courts. Once such "questions" (or even "doubts") are acknowledged to be "substantial" or "serious," the waiver authority should be construed to narrow the statute, precisely in order to avoid actual decision of the constitutional issues.

A. The Commission's Construction of Section 533(b)(4) Removes the Bases for the Fourth Circuit's Invalidation of the Statute

The Fourth Circuit raised serious constitutional questions about Section 533(b)(1) and (2) not because it found the risks of monopoly abuse underlying the statute to be anything but real, but because it found that a flat cross-ownership bar is too ill-fitting a way of addressing those risks: the targeted problems can be addressed through regulatory standards, and too much speech is foreclosed by forbidding in-region cable service. In particular, as to narrow tailoring, the Fourth Circuit relied on the " 'obvious less-burdensome alternative' " of allowing a telephone company to provide programming on its network under rules requiring substantial access to that network for independent programmers. Pet. App. 41a. As to alternative avenues of communication, the Fourth Circuit found the critical flaw to be that "the telephone

companies *cannot guarantee* that their programming will reach [their in-region] audience." *Id.* at 13a-14a.

The Commission's interpretation of Section 533(b)(4) by its terms solves both of these problems. Pet. App. 107a, 116a, 119a-120a. While the Commission has not detailed *all* of the circumstances where telephone company provision of video programming would be allowed under Section 533(b)(4), it has explicitly concluded that such direct provision of video programming *is* authorized under the single set of conditions identified by the Fourth Circuit as presenting an " 'obvious less-burdensome alternative,' " *i.e.*, where the telephone company is one among many programmers on its video dialtone network. Pet. App. 104a, 106a. Similarly, allowing direct telephone company retailing of video programming under those conditions eliminates the reason the Fourth Circuit found the statute to leave open too few avenues of in-region speech: under the Commission's rule, the telephone companies *can* "*guarantee* that their programming will reach [their in-region] audience." *Id.* at 13a-14a. As the Commission concluded, its interpretation of Section 533(b)(4) directly eliminates the bases for the Fourth Circuit's facial invalidation of the statute.

Moreover, the Commission's interpretation solves any "as applied" problem here, because it allows Bell Atlantic to carry out its concrete plan for video programming. In the district court, Bell Atlantic alleged in its complaint and subsequently stipulated that, if permitted to proceed, its plan was to enhance its copper telephone network to allow for its own video programming and that "the network will also be available for use by other video programmers on a common carrier basis." JA 13 (Complaint ¶ 28, opening paragraph of "as applied" count). *See* JA 214 (Stipulation ¶ 97: "If C&P's telephone network is enhanced as referred to in the Complaint, ¶ 28, plaintiffs assertedly plan to . . . use the network, as enhanced, for the transmission to consumers of video programming provided by [Bell Atlantic's video affiliate]

[and] the video programming of unaffiliated program providers"); *ibid.* (Stipulation ¶ 98: Bell Atlantic's network would be available to "unaffiliated video programmers . . . on a tariffed, non-discriminatory, basis"). The Commission's interpretation of Section 533(b)(4) permits telephone company provision of video programming in just such circumstances.

B. The Commission's Interpretation of Section 533(b)(4) Is a Proper Saving Construction

The Commission's construction of Section 533(b)(4) is "fairly possible" as a textual matter. *X-Citement Video*, 115 S. Ct. at 467. The Commission, of course, is owed deference in construing Section 533(b)(4). *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under these standards, the "good cause" authority of Section 533(b)(4) may properly be read to permit a waiver upon compliance with regulatory safeguards that address the economic dangers underlying the general cross-ownership rule while reflecting any material changes of circumstances since adoption of the rule, *i.e.*, changes affecting the policy balance of risks and benefits addressed in the statute.

"Good cause," as the Commission observed, is commonly interpreted to refer to materially changed circumstances. Pet. App. 99a, 112a; *see, e.g.*, *Illinois v. ICC*, 713 F.2d 305, 310 (7th Cir. 1983); *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981).[23] In addi-

[23] Bell Atlantic has pointed to *Kleem v. INS*, 479 U.S. 1308 (1986) (Scalia, Circuit Justice), as taking a narrow view of "good cause." Bell Atlantic Response to Petitions at 20-21. But the invocation of good cause in that case involved no claim of changed circumstances. Moreover, unlike the asserted claim for good cause relief in *Kleem*, the Commission's interpretation of Section 533(b)(4) would not abolish the rule. The rule will apply to any telephone company that fails to meet the specific Commission requirements for a waiver and will, moreover, supply the policy that determines the contours of those waiver requirements—which might prove distinctly objectionable to some telephone companies.

tion, a waiver based on and confined to new and well-defined circumstances, if the changes alter the relevant policy balance, would be "justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." Section 533(b)(4). Indeed, the statute's express direction to the Commission to "tak[e] into account the policy" of the section is most naturally read as an affirmative textual indication of congressionally granted authority for the Commission to do just what it did here, *i.e.*, to assess whether any changed circumstances alter the policy balance behind the presumptive bar of paragraphs (1) and (2) of the statute so that relaxation of the bar in specified circumstances, rather than rigid enforcement of it, would serve the procompetitive policy behind Section 533(b) and the Cable Act as a whole. *See* 47 U.S.C. §521(6).[24]

The conclusion that this construction is "fairly possible" is consistent with this Court's holding in *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994), that 47 U.S.C. § 203(b)(2), which permits the Commission to "modify" tariff-filing requirements only in "special circumstances," does not allow wholesale abrogation of the general tariff-filing rule. *Id.* at 2228. Most importantly, the principle requiring avoidance of serious constitutional issues played no role whatever in *MCI*. That principle significantly alters the interpretive calculus. Indeed, this Court in *X-Citement Video* relied on the principle to adopt what it acknowledged was not the "most natural grammatical reading" of the statute at issue. 115 S. Ct. at 467. *See also* cases cited in note 22, *supra*.

In any event, the statutory text at issue here is materially different from, and more readily accommodating of

[24] Section 533(b)(4) also states that waivers are to be "made in accordance with" the FCC's cross-ownership *regulation* in effect on Sept. 20, 1984. 47 U.S.C. § 533(b)(4). That regulation, like the statute, identified "good cause" as an independent basis for a waiver.

the asserted "changed circumstances" authority than, the text of Section 203(b)(2). The *MCI* decision rested overwhelmingly on the restrictive meaning of Section 203(b)(2)'s word "modify" as allowing only "moderate change." *Id.* at 2229-32 (framing issue as turning on the meaning of "modify"). Section 533(b)(4) does not use that word, but instead uses the broader term "waive," which does not imply the same limited degree of change.[25] In addition, Section 533(b)(4) contains, whereas Section 203(b)(2) lacks, an explicit, affirmative directive to the Commission to grant relief based on a direct consideration of the underlying statutory policy; the inclusion of such a directive is naturally understood as a suggestion that the Commission do just what it did here. Also, whereas Section 203(b)(2) uses the phrase "*special* circumstances" to *restrict* the Commission's authority, Section 533(b)(4) uses a different phrase, "*particular* circumstances"—which more readily carries the meaning of detailed and specific, rather than peculiar or unusual—and it uses this phrase, moreover, *not* as a restriction on the relief the Commission "may" grant but, in a separate sentence, to set a standard for waivers the Commission "shall" grant.

Finally, the Commission's construction of the waiver standard does not effect an "abolition of the rule itself" (Bell Atlantic Response to Petitions at 21): far from freely allowing entry into cable, the Commission would impose specific conduct-based conditions implementing the policy of the specific statutory section—conditions to which, in fact, Bell Atlantic and other telephone companies may vigorously object. *See* Pet. App. 100a, 117a. For example, the Commission has indicated that it generally would deny waivers for telephone company entry into the cable

[25] The dictionary definition of "waive" does not restrict the term to minor exceptions to a rule. *American Heritage Dictionary* 2008 (3d ed. 1992) ("give up (a claim or right) voluntarily; relinquish"; "refrain from insisting on or enforcing (a rule or penalty, for example); dispense with").

business through purchase of an existing cable system. *See* Pet. App. 117a. In its rulemaking to specify the conditions of waiver, the Commission may require telephone companies either to provide video dialtone service (allowing access by independent programmers) or to operate stand-alone cable systems, but not grant waivers for telephone companies to operate a joint voice-video facility over which it exercises control of the programming. The Commission may deny waivers for telephone companies that fail to comply with Title VI of the Communications Act, *i.e.*, with the Cable Act. The Commission may impose other requirements—*e.g.*, relating to corporate structure, accounting methods, audits, nondiscriminatory practices—as well. *See Fourth Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 4617 (1995); 94-1893 Pet. App. 113a. Unlike the Commission decision in *MCI*, which simply eliminated the tariff-filing duty for a whole class of telephone companies defined by who they are (*i.e.*, nondominant), the Commission's construction of Section 533(b)(4) will leave the presumptive statutory bar in place for all telephone companies that, though they may wish otherwise, fail to act in accord with the behavioral requirements made conditions of waiver.

If the Commission's construction of the text is thus "fairly possible" within the meaning of the doctrine requiring avoidance of serious constitutional questions (*X-Citement Video*, 115 S. Ct. at 467; note 22, *supra*), the Commission's construction also is "not plainly contrary to the intent of Congress." *X-Citement Video*, 115 S. Ct. at 472. Whatever the precise reach of the congressional judgment made in 1984, nothing in the "sparse" legislative history (Pet. App. 53a) reveals a clear judgment to preclude Commission waiver if, in the district court's words, "the rapidly changing nature of the telecommunications field has caused the rationale supporting the [presumptive bar in the] statute to evolve over time." Pet. App. 81a. To the contrary, the language ultimately

adopted in paragraph (4) suggests a compromise, following debate on the flexibility of the authority to be left to the Commission, designed not to resolve the issue.[26]

The particular policies behind Section 533(b) support the same conclusion. Congress sought to promote competition in Section 533(b) based on its evident view that, in the circumstances then prevalent, the anticompetitive risks of telephone company entry into cable presumptively outweighed what ordinarily are the procompetitive benefits of allowing market entry. But like Bell Atlantic's expert, Professor Hazlett (JA 173-74), the Commission has now concluded that there have been several changes that materially alter that cost-benefit policy balance in particular circumstances: notably, on the risk-of-entry side, cable is no longer a "fledgling" industry whose very development is threatened by telephone entry; on the benefits-of-entry side, there are new imperatives for development of new technologies and potential benefits from fair competition in the video market. Pet. App. 99a-100a, 112a-113a; *Video Dialtone Order*, 7 F.C.C.R. at 5844-45, 5848-49.[27] There is no clear evidence that Congress foreclosed the Commission's ability to assess such changing conditions to determine whether, under defined circumstances, telephone entry would now serve rather than undermine the very policy that underlies the statute: "to prevent the development of local media monopolies and

[26] The floor statement of the legislation's sponsors that the waiver authority should be "narrowly construed" (*see* page 14, *supra*), aside from being a familiar element of any such compromise, hardly forecloses the issue with any clear meaning: at most it prohibits the Commission from simply disagreeing with Congress's policy balance without any change of the circumstances that were considered by Congress. *See also Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) (sponsors' remarks "are certainly not controlling").

[27] As discussed below (*see* pages 41-44, *infra*), this is a matter involving judgment calls on both factual and policy questions, as to which different views are both reasonable.

to encourage a diversity of ownership of communications outlets." H.R. Rep. 934, *supra,* at 55.

The Ninth Circuit adverted to the possibility of such a saving construction in *GTE California, Inc. v. FCC, supra. See* Pet. App. 99a, 121a. And contrary to Bell Atlantic's contention (Response to Petitions at 21-22), this construction of Section 533(b)(4) is in fact consistent with the actual ruling of the D.C. Circuit in *NCTA v. FCC*, 914 F.2d 285 (D.C. Cir. 1990)—which did not consider any constitutional issue (Pet. App. 120a) and could not, in any event, have influenced the intent of the 1984 Congress. The D.C. Circuit held that the "good cause" basis for waivers under Section 533(b)(4) focuses on whether "the advantages to be derived from [the telephone company's] application cannot be realized in the absence of a waiver" (*id.* at 289) but that the Commission had made no such showing in that case. Here, consistent with that standard, as well as with the Commission's evolving pre-1984 approach to waivers (*see* pages 7-8, *supra*), the Commission has identified advantages, including technological and competitive benefits, to be gained from telephone entry into the cable business under prescribed conditions. Pet. App. 100a, 112a-113a.

In sum, if changes in relevant circumstances so seriously loosen the fit between the cross-ownership bar and the risks it addresses as to raise a serious question about the measure's constitutionality, as the Fourth Circuit and Bell Atlantic have concluded, those same changes ought to constitute good cause for a waiver that avoids the constitutional concerns with Section 533(b). The Commission's interpretation of Section 533(b)(4) rests on such changes. It is a proper saving construction, and the Fourth Circuit's facial invalidation of Section 533(b) should be reversed on that ground.

II. EVEN WITHOUT REGARD TO THE WAIVER AUTHORITY, SECTION 533(b) SURVIVES INTERMEDIATE SCRUTINY

Even aside from its mistaken disregard for the narrowing function served by a proper construction of "good cause," the Fourth Circuit decision should be reversed. The "intermediate scrutiny" of *Turner* and its precursors, applied with a searching focus on the justifications for the law, is the proper standard for review. But the court of appeals drew improper conclusions at each of the two steps—narrow tailoring and alternative means of communication—where it found fault with Section 533(b)(1) and (2).[28]

A. The Statute Is Narrowly Tailored to Serve Important Government Interests Unrelated to the Suppression of Free Expression

This Court in *Turner* explained that a statute survives intermediate scrutiny if it both " 'furthers an important or substantial government interest . . . unrelated to the suppression of free expression' " (114 S. Ct. at 2469, quoting *O'Brien*, 391 U.S. at 377) and, in addition, satisfies the requirement of "narrow tailoring." *Ibid.* The Court summed up this requirement as demanding that the law not " 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Ibid.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The Court also explained that the effectiveness of alternative means is part of the assessment: a

[28] We hereafter assume, as the Fourth Circuit did, that the waiver authority provides no substantial narrowing of the statute. In other words, we assume that, contrary to our argument above, Congress reserved to itself, and did not grant the Commission, the authority to determine when circumstances could be found to have so changed that the policy of the statute could better be addressed through regulatory checks rather than a broad structural bar. In fact, as we have noted (pages 16-17, *supra*), Congress gave renewed consideration to the issues presented by the cross-ownership rule in 1991 and 1992, and it did not modify the statute.

law is narrowly tailored " ' " so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." ' " *Ibid.*, quoting *Ward*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). The plurality in *Turner* then explained that, in the exercise of its "independent judgment when First Amendment rights are implicated," the Court's role is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." 114 S. Ct. at 2471.[29]

1. *The Interests Served by the Statute Are Important and Real*

The Fourth Circuit did not find, and could not have found, that Section 533(b) is facially invalid because it fails the first part of the intermediate-scrutiny test. That component of the test requires that the statute serve a real, rather than conjectural, interest unrelated to the suppression of free expression (here, the prevention of familiar economic harms) and that it directly and materially advance that interest (here, alleviate the harms). *Turner*, 114 S. Ct. at 2470 (plurality); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). The Fourth Circuit in this case correctly declined to fault Section 533(b) on this score.[30]

Both the background to Section 533(b) and the record in this case—to be judged under the standards applicable on summary judgment—attest to the well-recognized problems of economic abuse by a dual-market, regulated/unregulated monopolist that the statute addresses. The local telephone companies are still rate-regulated monop-

[29] Applying that standard, the plurality in *Turner* was "unable to conclude that the Government has satisfied either inquiry" required by intermediate scrutiny. 114 S. Ct. at 2470.

[30] *Compare Turner*, 114 S. Ct. at 2470-71 (plurality) (serious question about the reality of the underlying alleged problem of a threat to the broadcast industry).

olies, and the cable business not only is less regulated but has long been clearly perceived by the telephone companies to constitute a serious, and growing, threat to their basic monopolies.[31] There are, moreover, unquestionably massive opportunities for cost-shifting and discrimination in the dual provision of telephone and cable service, at least in the situation contemplated by Bell Atlantic: the construction of a single network for the joint carriage of voice and video signals.[32]

In these circumstances, the local telephone companies have the classic incentives, and substantial opportunities, to use entry into the cable business—notably, through

[31] *See* Pet. App. 67a; *United States v. Western Electric Co.*, 993 F.2d 1572, 1578 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); JA 254, 262, 270 (Owen affidavit); JA 201-02 (stipulations); JA 187 (Hazlett affidavit); JA 58-59 (FCC Staff study); *see also* pages 14-15, *supra* (legislative history reflecting telephone company recognition of cable threat to telephony at time of 1984 Act).

The Fourth Circuit did not dispute that telephone rate regulation, though modified in recent years to "mov[e] away" from the most traditional form of strict rate-of-return regulation (JA 299 (Bell Atlantic affiant)), still is widely tied to costs: nothing in the record suggests that "pure" price cap regulation, severing all connection to costs, has been adopted either by the FCC or generally by the States. (To sustain the Fourth Circuit's affirmance of the *facial* invalidation of Section 533(b), *see* Pet. App. 4a, 45a, 93a, Bell Atlantic would have to show—and it plainly has not—that "pure price cap" regulation has been so widely adopted by regulators as to render Section 533(b) "substantially overbroad." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).) Indeed, the record evidence is to the contrary. JA 254 and 262-64 (Owen affidavit), JA 334 (Owen reply affidavit). Nor did the Fourth Circuit doubt that the telephone and cable markets present the structural conditions for the economic problem targeted by Congress: they have differential price regulation and demand elasticities. *See* JA 251, 253 (Owen affidavit). Telephone companies, upon entering the cable business, would not be subject to cable rate regulation under the 1992 Act. *See Cable Rate Regulation Order*, 8 F.C.C.R. 5631, 5648 (¶ 18 n.45) (1993).

[32] *See* JA 212-14 (stipulations that, among other things, enhancement of facilities in Alexandria, Virginia, alone will cost \$50-100 million); JA 254 (Owen affidavit); JA 332 (Owen reply affidavit).

cost-shifting and discriminatory self-preference—to exploit telephone ratepayers, to harm the cable market, and to forestall the threat to the telephone monopoly that cable presents as the "second wire" for electronic communications. These problems, which are wholly unrelated to speech, are explained in detail in the record of this case (*see* JA 241-71 (Owen affidavit); JA 331-36 (Owen reply affidavit)), were elaborately set forth in the 1981 FCC Staff report (*see* pages 8-9, *supra*), were articulated by the United States at the time of the 1982 Bell System breakup (*see* pages 10-12, *supra*),[33] and have been recognized by the courts[34] and by the scholarly literature.[35]

[33] The Justice Department's merger guidelines, which generally take a lenient view of when vertical integration is of antitrust concern, single out for special suspicion the case of vertical integration by a regulated monopolist. *See* JA 249; *United States Dep't of Justice Merger Guidelines* § 4.23 (June 14, 1984) ("Evasion of Rate Regulation").

[34] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993) ("Firms can gain by shifting costs away from unregulated activities (where consumers would react to higher prices by reducing their purchases) into the regulated ones (where the price increase will cause little or no drop in sales because under regulation the prices are in a range where demand is relatively unresponsive to price changes)."); *California v. FCC*, 905 F.2d 1217, 1224 & n.5, 1235 (9th Cir. 1990) (discrimination problem, citing FCC sources; cost-shifting enables telephone company "to exact monopoly rents from basic service customers by burdening them with costs from unregulated activities"); *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378, 1379 (D.C. Cir. 1990) ("Diversified telephone companies possess a natural incentive to shift costs to their regulated telephone service, and thereby guarantee the recovery of those costs from ratepayers.").

A similar point about the distinctive dangers of dual-market participation where one market is a regulated monopoly market has been recognized in the context of tie-ins. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 n.4 (1984) (O'Connor, J., concurring in the judgment); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (White, J., dissenting).

[35] *See, e.g.*, JA 246-47; Brennan, *Why Regulated Firms Should Be Kept Out of Unregulated Markets: Understanding the Divestiture in U.S. v. AT&T*, 32 Antitrust Bull. 741 (1987); M. Kellogg, P. Huber, & J. Thorne, *Federal Telecommunications Law* § 9.3.4 at 437 (1992) ("A regulated utility that is also involved in an unregulated competitive business may have both the incentive and opportunity to shift the costs of competitive operations onto the regulated side of the line."); *id.* § 3.2.4, at 144 ("Even if only partially successful, cross-subsidy may undermine competition or efficiency on both sides of the regulatory line. Prices of the regulated service may rise above cost while production of the unregulated good or service may shift into the hands of an inefficient provider.").

Beyond that, the history of telephone company actions against independent cable companies (prior to 1970 and afterward), and the history of comparable actions in related competitive markets that led to the Bell System breakup, show that the distinctive risks of the "regulated/unregulated" dual-market monopolist are anything but purely theoretical. *See, e.g.*, JA 253, 255-56 (Owen affidavit); pages 5-7, 10-12, *supra*. Section 533(b) directly prevents these evils.

The Fourth Circuit did not, and could not, deem any of this familiar economics an insubstantial basis for congressional action. In reaching its decision, moreover, the Fourth Circuit refused to adopt the district court's "essential point" (Pet. App. 91a-92a) and instead accepted that entry into the retail cable business presents greater dangers of the targeted abuses than does the telephone companies' participation, allowed today, in the tariffed, common carrier, regulated transmission business. Pet. App. 39a. Of course, recognition of those additional risks is the essential premise for the government's repeated insistence, in recommending repeal of Section 533(b) as a policy matter, that significant *new* regulatory safeguards are needed, over and above those applicable to the transmission service telephone companies can today offer, if the telephone companies enter the cable business. *See* JA 370-374 (1994 Administration White Paper detailing needed new safeguards); JA 377 (FCC Chairman); JA 382-85 (Assistant Secretary of Commerce). And the

record on summary judgment supplies an explanation. Obtaining monopoly power over video transmission is quite simply more valuable to Bell Atlantic (which is therefore more likely to seek it) if it can be used to exploit the (less regulated) retail cable market than if its value is limited to the lesser profits available in the (more heavily regulated) transmission market. *See, e.g.*, JA 332-33 (Owen reply affidavit); *see National Rural Telecom Ass'n v. FCC*, 988 F.2d at 180-81. Not surprisingly, the Ninth Circuit, in its decision on Section 533(b), explicitly acknowledged the sufficiency of the evidence to establish this point. *US West, Inc. v. United States*, 48 F.3d 1092, 1102 (1995).

Section 533(b), in short, addresses—and directly and materially alleviates—well-recognized economic problems that are unrelated to speech. These problems have been expressly acknowledged by the Commission even as it has recommended repeal of Section 533(b) in the belief that the risks may be reduced (though not eliminated) by regulatory checks and are "outweighed" by the benefits of telephone entry into cable. *See* pages 15-16, *supra*. Nor are the problems limited in scope: they are "*inherent* in the joint provision of regulated monopoly services and unregulated competitive products or services" where substantial opportunities for cost-shifting and discrimination exist. *United States' Response to Public Comments*, 47 Fed. Reg. at 23,335 (emphasis added). The familiar problems addressed in the law were amply supported in law and telephone-company history and were not greatly controversial; indeed, the telephone companies themselves *accepted* the law. *See* page 15, *supra*. The Fourth Circuit properly did not question that Section 533(b) satisfies the first part of the *O'Brien* test.

2. *Congress Could Reasonably Find Alternatives to the Statute To Be Materially Less Effective Means of Addressing the Targeted Problems*

The basis for the Fourth Circuit's decision, instead, was its view about the proper means of addressing the

targeted evils. In the Fourth Circuit's view, Congress was required to rely on conduct-specific regulatory checks and administrative oversight, rather than a structural bar, as an adequate solution to the economic abuses addressed by the statute. Oddly enough, it reached this conclusion despite its explicit assumption that regulatory checks could reasonably be deemed insufficiently effective to prevent those abuses. Pet. App. 39a; *see also id.* at 91a & n.34 (district court likewise assuming regulatory inadequacy). The assumption, not the conclusion, was correct.

There is no reason in a case like this one to approach scrutiny of the judgment of insufficient regulatory effectiveness with a heavy dose of skepticism. *Compare Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (strict scrutiny of content-based law against the background of good reasons to suspect the lack of a dispassionate congressional assessment of regulatory effectiveness). Nor can this Court, in evaluating the constitutional validity of Congress's enactment, properly bind Congress to accept a regulatory agency's optimistic evaluation of its own capabilities (let alone other regulators' capabilities). In fact, there has long been ample support for the assessment that regulatory solutions are insufficiently effective to redress the problems of cost-shifting and discrimination endemic to a dual-market, regulated/unregulated monopolist.[36]

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[36] This is not tc say that contrary assessments would be *un*reasonable, either on the factual question of how effective regulatory checks are likely to be or on the policy questions of how much inefficacy should be tolerated and how large are the offsetting benefits of telephone entry into cable. *See* pages 16-17, 23 & note 28, *supra* (new FCC assessments). As to the question of regulatory effectiveness, Professor Robinson has noted: "The gap between Congress and the FCC on how to deal with the telco problem reduces to a different assessment of the reliability of FCC regulations. The FCC believes that its own discretionary programs are sufficient to avoid the risks of anticompetitive conduct. Self-assessments are not inherently wrong, of course, but the bias on which they rest is always ground for others—Congress, the public

The 1981 FCC Staff report detailed the strong reasons to doubt the efficacy of attempts to set and enforce cost-accounting and non-discrimination standards. *See* page 9, *supra*. The United States, in explaining the Bell breakup, attested in even stronger terms to the same inadequacy, noting as well the persistent failure of the Commission to solve these problems despite considerable efforts. *See* pages 11-12, *supra*. The General Accounting Office has twice examined the possibility of realistic enforcement of cross-subsidy standards by the Commission and twice come to a negative conclusion. *See* JA 79 (1987 GAO report); JA 118 (1993 GAO report). And experts in this case have submitted affidavits, based on long experience with the industry and the Commission, casting substantial doubt on the effectiveness of regulatory solutions. *See* JA 226-40 (Prof. Glen Robinson, former FCC Commissioner); JA 265-69 (Owen Affidavit).

These and other sources provide substantial grounds, in addition to the long history of failed administrative efforts, to deem insufficiently effective any realistic program of administrative oversight of cost-shifting and discrimination. As to cross-subsidy, the fundamental problem is the absence of non-arbitrary, objective standards for the allocation of shared costs or the decision to incur certain costs at all.[37] Beyond that are the problems of

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and the courts as appropriate—to take a skeptical hard look at the assessment. This counsel comes with particular force in light of the history of telco regulation, a history of FCC frustration in controlling telephone company practices." JA 226.

[37] *See, e.g.*, JA 57 (1981 FCC Staff study), 84 (GAO report: "unavoidably subjective nature of the cost allocation process"), 267-68 (Owen affidavit); *Permian Basin Area Rate Cases*, 390 U.S. 747, 804 (1968) ("There is ample support for the Commission's judgment that the apportionment of actual costs between two jointly produced commodities, only one of which is regulated by the Commission, is intrinsically unreliable"; footnote quoting economist's statement that "'[t]o make laborious computations purporting to divide [such] costs is "nonsense on stilts"'"); *United States Dep't of Justice Merger Guidelines* § 4.23 n.35 (referring

the massive number of the relevant transactions, the complex technology involved, the gross disparity in information available to the telephone companies and regulators, and the substantial degree of discretion inevitably embodied in any accounting system, providing fodder for lengthy and costly disputes. *See, e.g.*, JA 231-35, 266; pages 9, 11, *supra*. Efforts to prevent subtle discriminatory self-preference in the provision of essential monopoly services are subject to similar problems of technological complexity, informational disparity, and room for costly debate. *See, e.g.*, JA 73-75, 231, 268-69; pages 9, 11, *supra*. And both of these sets of problems are magnified by the fact that telephone costs are divided and subject to regulation partly at the federal level and partly at the state level, so that regulatory oversight would have to be effective at both the state and the federal levels—at both which there are grave problems of inadequate resources. *See, e.g.*, JA 236-38, JA 79, JA 119.

In the end, as Bell Atlantic and the Bell Operating Companies explained to the D.C. Circuit, the choice between barring their entry into an adjacent unregulated business or allowing entry subject to regulatory oversight "involves multi-faceted *policy judgments* based on market analysis, administrative experience, enforcement priorities,

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to "insoluble cost allocation problem"); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 27 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) ("Accounting systems for allocating investment between different services or customer classes are notoriously complicated and sometimes arbitrary." (quoting sources); M. Kellogg, P. Huber, & J. Thorne, *supra*, § 3.2.4, at 144 ("Certainly, the allocation of costs between closely related and interdependent businesses is an essentially arbitrary exercise; many economists therefore take cross-subsidy concerns very seriously. Cross-subsidy is of greatest concern when there are important common or joint costs among regulated and unregulated businesses—costs that cannot be clearly attributed to one business or the other."); *id.* § 9.3.4, at 437 ("common costs do create enormous opportunities for accounting hanky-panky").

economic policy, and a complex balancing of competitive risks and benefits; these judgments are not simple findings of fact or even applications of law to fact." Brief of the Bell Company Appellees at 50, *United States v. Western Electric*, No. 91-5263 (D.C. Cir. Aug. 17, 1992). Just as there was no adequate basis for the courts to set aside the government's judgment call on that issue when it proposed to lift the consent-decree restriction on the telephone companies' provision of "information services" (*United States v. Western Electric*, 993 F.2d at 1576-82) (balance of policies primarily for government, and judicial role limited to assuring reasonableness of government view, even if opposing view is also reasonable)), so there is no adequate basis for the judiciary to set aside the congressional judgment on the issue here. The Fourth Circuit could not properly make its own independent, intuitive judgment about regulatory effectiveness and the other elements of the policy mix the basis for invalidating a congressional enactment.

B. The Statute Is Not Properly Condemned As Leaving Insufficient Alternative Avenues of Communication

If Section 533(b) is narrowly tailored to serve the unquestionably important, speech-neutral governmental interests behind it—that is, if other means would not be as effective at protecting those interests (*Turner*, 114 S. Ct. at 2469)—it is hard to see what independent weight would attach to the Fourth Circuit's view, were it correct, that Section 533(b) also has too great an impact on Bell Atlantic's opportunities for speech. This Court in *Turner*, in describing the requirements of intermediate scrutiny, did not suggest that a statute must meet some additional, independent requirement of the sort applied by the Fourth Circuit. Rather, it ruled that a statute survives intermediate scrutiny, once it is shown to further an important government interest unrelated to the suppression of free expression, if it is narrowly tailored,

that is, if the interest would be achieved " ' "less effectively absent the regulation" ' " and hence the measure does not " ' "burden substantially more speech than is necessary" ' " to further the interest. 114 S. Ct. at 2469. Under that formulation, the constitutional inquiry would seem to be at an end based on the showing, made above, that Congress could reasonably find alternatives to the cross-ownership bar insufficiently effective at serving the important speech-independent interest in preventing the economic abuses targeted by the statute.

In any event, even if the "alternative avenues" inquiry represents a separate requirement of *O'Brien* scrutiny, the Fourth Circuit's view on this issue is factually and legally flawed. The court took too narrow a view of the opportunities that Bell Atlantic has to reach its desired (in-region) video customers under Section 533(b)(1) and (2). The court also took too narrow a view of the legal standards for judging the sufficiency of those opportunities.

As a factual matter, Bell Atlantic is hardly foreclosed from reaching in-region consumers with its video speech. Bell Atlantic may develop programming to offer to a local cable system or to a local broadcaster or satellite or other delivery service (or video store). Nothing in Section 533(b) bars Bell Atlantic from becoming a broadcaster itself (*see American Scholastic*, *supra* (statute applies only to "cable system")), or offering satellite service (direct broadcast service (DBS)), or offering "wireless cable" service (MMDS).[38] Bell Atlantic also may develop entire packages of programming and enter into contracts to supply the content for any of the programmer-retailers who will be dealing directly with sub-

[38] Bell Atlantic has in fact recently taken a large stake in an MMDS operator. *See Bell Atlantic to Shift to 'Wireless Cable' TV*, Wash. Post, May 17, 1995, at F1; *RBOCS Pump $100 Million Into Wireless Cable Firm, Spurring Consolidation*, Communications Daily, Mar. 30, 1995, at 1.

scribers on the Bell Atlantic "video dialtone" network. *See* Bell Atlantic Ct. App. Br. 74 (anticipating "hundreds or thousands" of channels on network). *See also* 47 U.S.C. § 532 (leased access to cable systems).

Bell Atlantic accordingly is in a comparable position to that of cable programmers today who do not own or control their own cable systems. *Compare* Pet. App. 13a-14a. What Section 533(b)(1) and (2) precisely bar is the in-region retailing of *wire*-delivered video programming on a cable system, because that is the activity presenting the targeted problems of economic abuse. This bar, while triggering First Amendment scrutiny, does not leave the telephone companies without alternative means to reach in-region customers with their video programs.

In judging Section 533(b)(1) and (2) unduly limiting, the Fourth Circuit not only ignored several of the channels of communication just mentioned, but also disregarded what would seem the central precedent for judging the legal significance of the opportunities for speech left unrestricted to Bell Atlantic—*FCC v. NCCB*, *supra*—in which this Court unanimously upheld the bar on in-region broadcaster-newspaper cross-ownership. The Fourth Circuit simply dismissed the relevance of this Court's decision in *NCCB* on the ground that "the regulation there at issue affected ownership *of the broadcast media*" and "the instant case does not involve regulation of the broadcast media." Pet. App. 19a (emphasis in original; footnote omitted). These statements accurately describe a distinction, but they furnish no explanation of why the distinction matters under the First Amendment.

In *NCCB*, this Court, applying a standard comparable to intermediate scrutiny (though not invoking any specific standard), held that the government could constitutionally impose a flat ban that prohibited the holder of a broadcast license, as long as it retained that license, from entering the most venerable of protected speech businesses (newspaper publishing) in its service area.

The Court explained that the ban was justified as serving the goal of diversity of local media ownership. And the Court concluded that sufficient alternative avenues of communication were left to the broadcaster, who could engage in non-newspaper speech in-region plus all forms of speech out-of-region. *NCCB*, 436 U.S. at 794-802.[80]

If *NCCB* is a "broadcaster" case, the First Amendment relevance of that fact must reside not in labels but in the fact that the government may legitimately deem common ownership of a broadcast station and a newspaper in the same community to give rise to a genuine public problem: undue power in local speech markets. So, here, the government may legitimately deem common ownership of a local telephone monopoly and a cable system to give rise to a genuine public problem. Indeed, the law addressing this problem should be of less, not more, First Amendment concern than the measure in *NCCB*. Here, after all, the foreclosed business is cable service, not newspaper publishing, and the government purpose rests on traditional, non-suspect, speech-neutral economic concerns, not simply a government assessment of the degree of power someone should have as a speaker.

NCCB thus supports the conclusion that, given the established dangers of monopoly abuse, a local telephone monopolist, as long as it remains a local telephone monopolist, may be barred from entering the cable business in-region—and unrestricted opportunities for out-of-region speech of all sorts, and for all speech but direct cable retailing in-region, are legally sufficient. If a company may be required to exit a *speech* business (broadcasting) as a condition of entering another protected speech business (newspaper publishing or cable), the First Amendment impact is smaller, not greater, when

[80] Relying on *NCCB*, the Fifth Circuit has upheld the cable-broadcast cross-ownership rule against First Amendment challenge. *See Marsh Media Ltd. v. FCC*, 798 F.2d 772 (5th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).

entry into a protected speech business is conditioned on foregoing participation in a *non-speech* business (telephone common carriage). *Cf. FCC v. League of Women Voters*, 468 U.S. 364, 387 (1984) (broadcasters have more, not less, speech rights than common carriers). The Fourth Circuit erred in disregarding *NCCB* in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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